

Mar 23, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SARA J.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:18-cv-00322-SMJ

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING THE  
COMMISSIONER'S MOTION  
FOR SUMMARY JUDGMENT**

Before the Court, without oral argument, are the parties' cross-motions for summary judgment, ECF Nos. 11, 12. Plaintiff Sara J. appeals the Administrative Law Judge's (ALJ) denial of her application Supplemental Security Income (SSI) and Disability Insurance (DI) benefits. Plaintiff alleges the ALJ (1) improperly discounted Plaintiff's symptom testimony and (2) improperly discounted or dismissed medical opinions. ECF No. 11. The Commissioner of Social Security ("Commissioner") asks the Court to affirm the ALJ's decision. ECF No. 12.

Upon reviewing the administrative record, the parties' briefs, and the relevant authority, the Court is fully informed. For the reasons set forth below, the Court finds the ALJ committed reversible errors. Although these errors invalidated the

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1 ALJ's conclusion that Plaintiff did not qualify for benefits, Plaintiff's entitlement is  
2 not clear from the face of the record. Accordingly, the Court grants Plaintiff's  
3 motion for summary judgment, denies the Commissioner's motion for summary  
4 judgment, and remands for further proceedings.

5 **BACKGROUND<sup>1</sup>**

6 Plaintiff applied for SSI benefits on November 11, 2015 and applied for DI  
7 benefits on November 29, 2015. AR 166–78.<sup>2</sup> The Commissioner denied Plaintiff's  
8 application on July 1, 2016, *see* AR 99–102, and denied it again on reconsideration,  
9 *see* AR 106–08. At Plaintiff's request, a hearing was held before ALJ Jesse  
10 Shumway. AR 36–69. The ALJ denied Plaintiff benefits on January 3, 2018.  
11 AR 12–31. The Appeals Council denied Plaintiff's request for review on  
12 August 17, 2018. AR 1–6. Plaintiff then appealed to this Court under 42 U.S.C.  
13 §§ 405(g), 1383(c)(3). ECF No. 1.

14 **DISABILITY DETERMINATION**

15 A "disability" is defined as the "inability to engage in any substantial gainful  
16 activity by reason of any medically determinable physical or mental impairment  
17 which can be expected to result in death or which has lasted or can be expected to  
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19 <sup>1</sup> The facts, thoroughly stated in the record and the parties' briefs, are only briefly  
summarized here.

20 <sup>2</sup> References to the administrative record (AR), ECF No. 8, are to the provided page  
numbers to avoid confusion.

1 last for a continuous period of not less than twelve months.” 42 U.S.C.  
2 §§ 423(d)(1)(A), 1382c(a)(3)(A). The decision-maker uses a five-step sequential  
3 evaluation process to determine whether a claimant is disabled. 20 C.F.R.  
4 §§ 404.1520, 416.920.

5 Step one assesses whether the claimant is engaged in substantial gainful  
6 activities. If he is, benefits are denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he  
7 is not, the decision-maker proceeds to step two.

8 Step two assesses whether the claimant has a medically severe impairment or  
9 combination of impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant  
10 does not, the disability claim is denied. If the claimant does, the evaluation proceeds  
11 to the third step.

12 Step three compares the claimant’s impairment with a number of listed  
13 impairments acknowledged by the Commissioner to be so severe as to preclude  
14 substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1,  
15 416.920(d). If the impairment meets or equals one of the listed impairments, the  
16 claimant is conclusively presumed to be disabled. If the impairment does not, the  
17 evaluation proceeds to the fourth step.

18 Step four assesses whether the impairment prevents the claimant from  
19 performing work he has performed in the past by examining the claimant’s residual  
20 functional capacity, or RFC. 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant

1 is able to perform his previous work, he is not disabled. If the claimant cannot  
2 perform this work, the evaluation proceeds to the fifth step.

3 Step five, the final step, assesses whether the claimant can perform other  
4 work in the national economy in view of his age, education, and work experience.

<sup>5</sup> 20 C.F.R. §§ 404.1520(f), 416.920(f); see *Bowen v. Yuckert*, 482 U.S. 137 (1987).

If the claimant can, the disability claim is denied. If the claimant cannot, the disability claim is granted.

The burden of proof shifts during this sequential disability analysis. The claimant has the initial burden of establishing a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). The burden then shifts to the Commissioner to show (1) the claimant can perform other substantial gainful activity, and (2) that a “significant number of jobs exist in the national economy,” which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984). A claimant is disabled only if his impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experiences, engage in any other substantial gainful employment that exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

## **ALJ FINDINGS**

20 At step one, the ALJ found Plaintiff had not engaged in substantial gainful

1 activity since the application date. AR 17.

2 At step two, the ALJ found that Plaintiff had five medically determinable  
3 severe impairments: obesity, diabetes mellitus, panic disorder with agoraphobia,  
4 generalized anxiety disorder, and major depressive disorder. *Id.*

5 At step three, the ALJ found that Plaintiff did not have an impairment or  
6 combination of impairments that met or medically equaled the severity of a listed  
7 impairment. *Id.* at 19.

8 At step four, the ALJ found that Plaintiff had an RFC sufficient to perform  
9 medium work as defined in 20 C.F.R. §§ 404.1567(c), 416.967(c) with the  
10 following limitations: “[Plaintiff] cannot have concentrated exposure to hazards  
11 such as unprotected heights and moving mechanical parts; she requires a routine,  
12 predictable work environment in which changes are no more than occasional and  
13 [Plaintiff] makes no more than simple decisions and is not required to multitask;  
14 she can have only occasional contact with the public, supervisors, and coworkers;  
15 she is precluded from collaborative tasks; she is precluded from exposure to crowds;  
16 and she may need an average of one unscheduled break per day of ten to fifteen  
17 minutes in duration, in addition to normal breaks.” AR 20–21.

18 In reaching this determination, the ALJ gave great weight to the opinions of  
19 the medical expert who testified at the hearing, Dr. Donna Veraldi, Ph.D., and state  
20 agency medical consultant Howard Platter, M.D. AR 22–23. The ALJ gave little

1 weight to the opinions of Dr. Kayleen Islam-Zwart, Ph.D., who evaluated Plaintiff,  
2 and state agency psychological consultants John D. Gilbert, Ph.D., and Renee  
3 Eisenhauer, Ph.D. *Id.* at 23–24. The ALJ gave no weight to the physical functional  
4 capacity opinion given by single decision maker James Mercer. *Id.* at 23.

5 At step five, the ALJ found Plaintiff had no past relevant work but that  
6 Plaintiff could perform other jobs existing in the national economy including small  
7 fish cleaner, cook helper, or kitchen helper. *Id.* at 24–25.

## 8 STANDARD OF REVIEW

9 The Court must uphold an ALJ’s determination that a claimant is not disabled  
10 if the ALJ applied the proper legal standards and there is substantial evidence in the  
11 record, considered as a whole, to support the ALJ’s decision. *Molina v. Astrue*, 674  
12 F.3d 1104, 1110 (9th Cir. 2012) (citing *Stone v. Heckler*, 761 F.2d 530, 531 (9th  
13 Cir. 1985)). “Substantial evidence ‘means such relevant evidence as a reasonable  
14 mind might accept as adequate to support a conclusion.’” *Id.* at 1110 (quoting  
15 *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009)). This  
16 must be more than a mere scintilla but may be less than a preponderance. *Id.*  
17 at 1110–11 (citation omitted). If the evidence supports more than one rational  
18 interpretation, the Court must uphold an ALJ’s decision if it is supported by  
19 inferences reasonably drawn from the record. *Id.*; *Allen v. Heckler*, 749 F.2d 577,  
20 579 (9th Cir. 1984). The Court will not reverse an ALJ’s decision if the errors

1 committed by the ALJ were harmless. *Molina*, 674 F.3d at 1111 (citing *Stout v.*  
2 *Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055–56 (9th Cir. 2006)). “[T]he burden  
3 of showing that an error is harmful normally falls upon the party attacking the  
4 agency’s determination.” *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009).

## 5 ANALYSIS

### 6 A. The ALJ erred in discounting Plaintiff's subjective symptom testimony

7 Plaintiff assigns error to the ALJ’s decision to discount Plaintiff’s own  
8 subjective symptom testimony. ECF No. 11 at 16–19. The Commissioner contends  
9 the ALJ properly discounted Plaintiff’s symptom testimony because it was  
10 inconsistent with the treatment record, including Plaintiff’s reports to her treating  
11 providers, and were undermined by her activities. ECF No. 12 at 2–4.

12 Where a claimant presents objective medical evidence of impairments that  
13 could reasonably produce the symptoms complained of, an ALJ may reject the  
14 claimant’s testimony about the severity of his symptoms only for “specific, clear  
15 and convincing reasons.” *Burrell v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014).  
16 The ALJ’s findings must be sufficient “to permit the court to conclude that the ALJ  
17 did not arbitrarily discredit claimant’s testimony.” *Tommasetti v. Astrue*, 533  
18 F.3d 1035, 1039 (9th Cir. 2008). General findings are insufficient. *Lester v.*  
19 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

1       In evaluating the claimant’s credibility, the “ALJ may weigh inconsistencies  
2 between the claimant’s testimony and his or her conduct, daily activities, and work  
3 record, among other factors.” *Bray*, 554 F.3d at 1227. The Court may not second  
4 guess the ALJ’s credibility findings that are supported by substantial evidence.  
5 *Tommasetti*, 533 F.3d at 1039. However, inconsistent reports of positive mental  
6 health symptoms outside the context of treatment, remission, or overall  
7 improvement will not independently support an ALJ’s decision to reject a  
8 claimant’s testimony as to their mental health symptoms. *See Garrison v. Colvin*,  
9 759 F.3d 995, 1018 (9th Cir. 2014) (finding ALJ erred by “improperly singl[ing]  
10 out a few episodes of temporary well-being from a sustained period of  
11 impairment”).

12       The ALJ found Plaintiff’s testimony that she has daily panic attacks  
13 inconsistent with the treatment record. AR 21–22. The ALJ cited to multiple  
14 treatment records illustrating, in the ALJ’s view, that Plaintiff’s panic attacks are  
15 “much less frequent and severe than alleged.” AR 22. However, a review of these  
16 records does not support the ALJ’s conclusion. For example, the ALJ said Plaintiff  
17 reported panic attacks three times per week in October 2015. AR 22. Only one of  
18 the records on which the ALJ relied, in which Plaintiff reported “a few panic attacks  
19 over the week,” supports this finding; another record the ALJ cited, in fact, indicates  
20 Plaintiff’s panic attacks had increased from three per week to daily. AR 290, 346.

1       The ALJ also noted that Plaintiff reported that the prescription medication  
2 Paxil was extremely effective in controlling her panic attacks. AR 22. However, the  
3 record cited by the ALJ in support of this was from 2007, long before Plaintiff's  
4 application date. AR 962–63. Further, this record is not inconsistent with Plaintiff's  
5 testimony. Rather, it is consistent with her statement that Paxil helped her panic  
6 disorder, which had been ongoing for ten years, for the first five years. AR 60.  
7 Plaintiff went on to testify that after those five years, Paxil stopped being effective.  
8 *Id.* The ALJ also stated Plaintiff "denied any panic attacks on occasion" and cites  
9 to a record from 2011 in support. AR 22. This record is again from a period well  
10 before the application date, presumably before Plaintiff's panic attacks became  
11 debilitating and possibly during the five-year period in which she indicated her  
12 panic disorder was managed with Paxil. *See* AR 60.

13       Further, to the extent the ALJ accurately noted periods during which Plaintiff  
14 experienced fewer panic attacks, these are exactly the type of inconsistent reports  
15 of positive mental health symptoms that should not be considered outside of the  
16 context of treatment, remission, or overall improvement. *See Garrison*, 759 F.3d  
17 at 1018. The ALJ noted that in December 2015, Plaintiff reported "lessening  
18 daytime and nighttime panic attacks," AR 22, but this record indicated a one-week  
19 decrease from "nightly panic attacks" during which, despite high stress, "she is not  
20 panicking," AR 336. The ALJ next cited a record from over a year later indicating

1 Plaintiff had gone “one week without panic attacks.” AR 22. The ALJ then cited a  
2 record from a year and a half later indicating Plaintiff had gone one month with a  
3 single large panic attack and a few minor attacks. AR 22.

4       Taken outside of the context of overall treatment, it is impossible to know  
5 whether these records merely reflect temporary periods of improvement rather than,  
6 as the ALJ asserts, that Plaintiff’s attacks are “much less frequent and severe than  
7 alleged.” AR 22. Indeed, the record also contains consistent and recent reports of  
8 frequent panic attacks that did not respond to medication. *See, e.g.*, AR 1002  
9 (reporting “having panic attacks 3–4 attacks a day for the last 5 days” in  
10 February 2017 and that the attacks did not respond to medication).

11       The ALJ also discounted Plaintiff’s symptom testimony because her level of  
12 daily activity was “minimally limited” and “cannot be reconciled with the  
13 considerable severity alleged.” AR 22. The ALJ pointed to Plaintiff’s ability to  
14 engage in independent self-care, preparing meals for herself and her mother, caring  
15 for a pet, and doing household chores. *Id.* However, these basic daily living  
16 activities are neither a “robust level of daily activities,” as the ALJ characterized  
17 them, nor are they incompatible with Plaintiff’s claimed disability.

18       As the Ninth Circuit has observed, ALJs are often too quick to conclude that  
19 a claimant’s ability to sustain the minimal requirements of daily living precludes  
20 the claimant from being unable to obtain gainful employment. *Garrison*, 759 F.3d

1 at 1016 (“[I]mpairments that would unquestionably preclude work and all the  
2 pressures of a workplace environment will often be consistent with doing more than  
3 merely resting in bed all day.”); *see also Bjornson v. Astrue*, 671 F.3d 640, 647 (7th  
4 Cir. 2012) (“The critical differences between activities of daily living and activities  
5 in a full-time job are that a person has more flexibility in scheduling the former than  
6 the latter, can get help from other persons . . . , and is not held to a minimum standard  
7 of performance, as she would be by an employer. The failure to recognize these  
8 differences is a recurrent, and deplorable, feature of opinions by administrative law  
9 judges in social security disability cases.” (citations omitted)).

10 Finally, the ALJ briefly stated, without citation, that Plaintiff’s mental status  
11 exams are “generally normal” and that her “psychological state is almost always  
12 described as normal.” AR 22. However, it is not clear how normal mental status  
13 exams are incompatible with severe panic disorder, and the ALJ offered no  
14 justification for that conclusion.<sup>3</sup> On remand, the ALJ shall reevaluate the  
15 determination that Plaintiff’s subjective symptom testimony was not supported by  
16 the record in light of the Court’s conclusions.

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18 <sup>3</sup> The Court suspects the ALJ may have been implying that, if Plaintiff’s panic  
19 attacks were as frequent as alleged, she necessarily would have had an attack during  
20 a medical or psychiatric appointment. However, without more explanation, this  
cannot be a specific, clear, and convincing reason to reject Plaintiff’s symptom  
testimony. *See Burrell*, 775 F.3d at 1137.

1      **B. The ALJ erred in discounting the opinions of Dr. Islam-Zwart**

2      Plaintiff argues the ALJ erred by giving little weight to the opinion of  
3 Dr. Kayleen Islam-Zwart, Ph.D., who evaluated Plaintiff on two occasions. ECF  
4 No. 11 at 19. The Commissioner argues the ALJ reasonably weighed Dr. Islam-  
5 Zwart's opinions. ECF No. 12 at 5.

6      For SSI appeal purposes, there are three types of physicians: "(1) those who  
7 treat the claimant (treating physicians); (2) those who examine but do not treat the  
8 claimant (examining physicians); and (3) those who neither examine nor treat the  
9 claimant [but who review the claimant's file] (non-examining physicians)."

10     *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001). Generally, a  
11 treating physician's opinion carries more weight than an examining physician's,  
12 and an examining physician's opinion carries more weight than a non-examining  
13 physician's. *Id.* at 1202. "If a treating or examining doctor's opinion is contradicted  
14 by another doctor's opinion, an ALJ may only reject it by providing specific and  
15 legitimate reasons that are supported by substantial evidence." *Bayliss*, 427 F.3d  
16 at 1216 (citing *Lester*, 81 F.3d 821, 830–31).

17     An ALJ may discount an opinion if it is "based 'to a large extent' on an  
18 applicant's self-reports and not on clinical evidence, and the ALJ finds the applicant  
19 not credible." *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (quoting  
20 *Tommasetti*, 533 F.3d at 1041 (9th Cir. 2008)). However, "the rule allowing an ALJ

1 to reject opinions based on self-reports does not apply in the same manner to  
2 opinions regarding mental illness.” *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th  
3 Cir. 2017). Psychiatric evaluations “will always depend in part on the patient’s self-  
4 report” because “unlike a broken arm, a mind cannot be x-rayed.” *Id.* at 1049  
5 (internal quotation marks omitted) (quoting *Poulin v. Bowen*, 817 F.2d 865, 873  
6 (D.C. Cir. 1987)).

7 Dr. Islam-Zwart’s opinions were contradicted by the medical expert who  
8 testified at the hearing, Dr. Donna Veraldi, Ph.D. AR 22–23. As such, the ALJ was  
9 required to give specific and legitimate reasons that were supported by substantial  
10 evidence to discount Dr. Islam-Zwart’s opinions. *Bayliss*, 427 F.3d at 1216. In  
11 rejecting Dr. Islam-Zwart’s opinions, the ALJ stated that the results of Dr. Islam-  
12 Zwart’s mental status examination of Plaintiff were normal. AR 23. The ALJ went  
13 on to state, “Dr. Islam-Zwart’s opinion of significant functional limitation  
14 necessarily must have been based on the claimant’s subjective allegations, rather  
15 than observational or objective medical evidence” and that “Dr. Islam-Zwart did  
16 not offer explanation regarding the significant chasm between her evaluation  
17 findings and the conclusions she made.” *Id.*

18 Contrary to the latter assertion, Dr. Islam-Zwart’s opinions clearly indicate  
19 that her findings were largely based on Plaintiff’s self-reports. *See* AR 286, 1116  
20 (indicating no records were reviewed because none were available); AR 286–89,

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1 1116–19 (referring to attached narrative); AR 290–93, 1120–23 (reflecting  
2 evaluation was largely based on Plaintiff’s self-reports). As set out above, an ALJ  
3 may discount a physician’s opinion based largely on the claimant’s self-reports  
4 where the ALJ finds the claimant was not credible. *Ghanim*, 763 F.3d at 1162.  
5 However, here that is limited by the nature of Plaintiff’s panic disorder, the  
6 diagnosis of which is necessarily based on self-reports. *Buck*, 869 F.3d at 1049 (9th  
7 Cir. 2017). Moreover, because the ALJ erred in discounting Plaintiff’s subjective  
8 symptom testimony, this is not a specific and legitimate reason nor is it supported  
9 by substantial evidence. As such, the ALJ erred in discounting Dr. Islam-Zwart’s  
10 opinion and shall reevaluate that opinion’s weight on remand.

11 **C. Remand, rather than an award of benefits, is appropriate**

12 In light of the errors identified above, further proceedings are clearly  
13 necessary. Though there is certainly substantial evidence to support Plaintiff’s  
14 entitlement to benefits, that conclusion is not “clear from the record.” *Garrison*, 759  
15 F.3d at 1019. Accordingly, the Court remands this matter to the ALJ for further  
16 proceedings consistent with this Order, rather than simply awarding benefits.

17 **CONCLUSION**

18 For the reasons set forth above, **IT IS HEREBY ORDERED:**

19 1. Plaintiff’s Motion for Summary Judgment, ECF No. 11, is

20 **GRANTED.**

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**2. The Commissioner's Motion for Summary Judgment, ECF No. 12, is DENIED.**

3. The Clerk's Office shall **ENTER JUDGMENT** in favor of **PLAINTIFF** and thereafter **CLOSE** the file.

**IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
de copies to all counsel.

**DATED** this 23rd day of March 2020.

Salvador Menejaza  
SALVADOR MENÉJAZA, JR.  
United States District Judge